Supreme Court, U.S.
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No. 98-1258

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

VICTOR HASSINE,

Petitioner,

v.

CHARLES ZIMMERMAN, SUPERINTENDENT, AND THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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The respondents respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Third Circuit's judgment dated November 9, 1998.

COUNTER-STATEMENT OF CASE

A. Procedural History

On June 11, 1981, the petitioner, Victor Hassine, was convicted by a jury in the Court of Common Pleas of Bucks County, of the First Degree Murder of James Puerale, the attempted Murders of Albert Kellet, Lois Kellet and George Sofield, Criminal Conspiracy and Criminal Solicitation. A codefendant, George Gregory Orlowski, was convicted of identical crimes following the same trial.

On June 4, 1983, the petitioner received a sentence of life imprisonment for the Murder, and consecutive sentences on several related crimes. The Pennsylvania Superior Court affirmed the judgment of sentence by an Opinion and Order dated February 8, 1985. The Pennsylvania Supreme Court denied a Petition for Allowance of Appeal on April 15, 1986.

On October 28, 1986, the petitioner filed a Petition for Writ of Habeas Corpus, alleging in part that the trial prosecutor improperly commented on his post-arrest silence. The case was referred to an Administrative United States Magistrate, who issued a Report and Recommendation on June 15, 1988, denying and dismissing the Petition for Writ of Habeas Corpus. The Magistrate found that the trial prosecutor had violated the holding of *Doyle v. United States*, 426 U.S. 610, 96 S. Ct. 2240 (1996), but concluded that there was no doubt that the error was harmless in light of the overwhelming evidence of guilt against petitioner.

On June 24, 1988, the petitioner filed objections to the Report and Recommendation of the Magistrate and the District Court granted *de novo* review.

On November 15, 1989, the Honorable Norma L. Shapiro of the United States District Court for the Eastern District of Pennsylvania issued a Memorandum and Order, in which she found that the prosecutor had committed a *Doyle* violation by asking the petitioner certain questions on cross-examination concerning his failure to relate his version of events to law enforcement prior to trial. App. 86. On the issue of harmless error, the District Court continued the matter under advisement, noting that it was unclear whether the Magistrate had applied the "beyond a reasonable doubt" standard of review for constitutional errors set forth in *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824 (1967), or the less rigid trial error standard set forth in *Government of Virgin Islands v. Martinez*, 847 F.2d 125 (3d Cir. 1988). App. 87. Oral argument was held on the issue of harmless error on December 1, 1989.

By an Order dated July 14, 1993, the District Court scheduled a telephone conference with counsel to discuss the significance of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S. Ct. 1710 (1993); *Commonwealth v. Clark*, 533 Pa. 579, 626 A.2d 154 (1993); and *Commonwealth v. Turner*, 499 Pa. 579, 454 A.2d 537 (1982), with respect to the petitioner's case. The telephone conference occurred on July 29, 1993, at which time it was discussed whether the *Chapman* harmless error test should be applied to the petitioner's case, or the *Brecht* standard — whether the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. at 632.

Between August 2, 1993 and August 22, 1997, a series of letter briefs were submitted to the District Court by counsel

for the petitioner and respondent, regarding the proper harmless error standard to be applied to the case, and whether harmless error should be found under either standard. In addition, another oral argument was held on May 4, 1995.

On October 30, 1997, the District Court issued a Memorandum and Order denying the petitioner's Petition for a Writ of Habeas Corpus. The District Court applied the *Brecht* standard in finding harmless error, although it suggested by way of footnote that the error would have been harmless under the *Chapman* reasonable-doubt standard as well.

The District Court issued a Certificate of Probable Cause on November 6, 1997, and the petitioner filed a timely appeal to the United States Court of Appeals for the Third Circuit.

By an Opinion filed November 9, 1998, the United States Court of Appeals for the Third Circuit affirmed the District Court. The present petition followed.

B. Factual History

An abundance of evidence adduced at the jury trial in this case established the formation and execution of a murder conspiracy involving the petitioner, and his co-conspirators, George Gregory Orlowski and William Eric Decker. The target of the murder plot was one Albert Kellet. The conspiracy culminated in a brutal shooting spree which took place in Falls Township, Bucks County, Pennsylvania, on August 22, 1980, causing the death of one James Puerale, and inflicting serious injury upon Albert Kellet and Lois Kellet.

Petitioner's co-conspirator, William Decker, who was the shooter, testified at trial for the Commonwealth, along with thirty-three (33) other witnesses who corroborated many aspects

of his testimony, and supplied additional information linking petitioner to the murder.

The Commonwealth produced four witnesses at trial who testified as to petitioner's statements that he intended to have Albert Kellet killed, and verified the meetings of conspirator's testified to by Decker. (NT 558-562, 628, 744, 810). The testimony of numerous other witnesses established a motive of animosity and hostility which arose as a result of a robbery of money and drugs and an ensuing exchange of threats between the parties. (NT 500-07, 527, 722, 744, 809-10).

It was uncontradicted at trial that the murder weapon belonged to petitioner's father. Numerous witnesses also established the attempts of petitioner and Decker to obtain guns and ammunition before the murder. (NT 486-90, 555-557, 626-27, 708-709, 794-804, 811, 816, 933, 955).

Two witnesses placed petitioner driving around the area of the shooting near the time of the shooting looking for Decker. (NT 864-70, 1224). Five witnesses testified to various actions taken by Hassine to cover up the crime. (NT 577, 631, 901, 1044, 1051, 1228).

The petitioner testified in his own defense at trial, denying that he was involved in the murder and that he had engaged in any unlawful conduct during the course of the alleged conspiracy. (NT 1428-1478).

On review the United States Court of Appeals for the Third Circuit in its Opinion of November 9, 1998, found that Hassine's testimony did not present a strong counter to the state's evidence, stating:

> Hassine's story was undermined not only by evidence of his disregard for the truth, but by his

> own testimony in which he set forth strained and unrealistic explanations for his conduct. . . .

App. 39.

On direct examination, the petitioner, in order to explain why he had not previously told the police his version of events, testified that he had been willing and available to speak with police investigators about the facts of the case and the weapon involved, so long as contact was made through his attorneys. (NT 1479, 1481). The following testimony was elicited from him in this regard by his trial counsel:

> BY DEFENSE COUNSEL:
>
> Q. Did you receive advice from him as to how you should conduct yourself in relation to his investigation?
>
> A. Yes.
>
> Q. Did you follow that advice?
>
> A. Yes, I did.
>
> Q. What I specifically want to know: Did you go to the police at any time and tell them the facts as you narrated them now?
>
> A. No, I did not.
>
> Q. Why is that?

A. Under advice of my attorney we were only to contact the police through my attorneys and with counsel present.

Q. Did your attorney offer to make you available to the police?

A. Yes, he did.

Q. Did your attorney offer to make available your father, for example, in connection with identifying the gun?

A. Yes, he did.

Q. Were any of these offers ever taken up by the police authorities?

A. They were not.

(NT pp. 1480-81).

In response to this line of questioning, the trial prosecutor, on cross-examination asked the following questions of the petitioner:

Q. How long have you been sitting in jail, sir?

A. Close to seven months.

Q. And you have been sitting in Bucks County Prison?

A. No, sir.

Q. You were in Bucks County Prison for a time?

A. About a month and a half.

Q. You were sitting in Holmesburg Prison?

A. For about five months.

Q. And another prison?

A. Delaware County.

Q. And conditions are not very good?

A. No sir.

Q. You sat for seven months in prison with the knowledge of what was really involved in regard to this gun, and you just kept it to yourself because your attorney said to keep it to yourself?

DEFENSE COUNSEL: Objection.

THE COURT: Sustained.

BY THE DISTRICT ATTORNEY:

Q. But you kept it to yourself until you came in to a court of law today and said it for the first time, in any event, outside of perhaps your family or your lawyer?

DEFENSE COUNSEL: Objection.

BY THE DISTRICT ATTORNEY:

Q. For the first time?

DEFENSE COUNSEL: That is objected to.

THE COURT: Sustained.

(NT 1543-1544).

The state appellate courts found that the prosecutor's questions concerning the petitioner's post-arrest silence were proper in the context in which they were asked. Both the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit, however, held that the prosecutor's questioning in this regard was violative of *Doyle*, but the error was determined to be harmless due to the overwhelming evidence of guilt.

REASONS FOR DENYING THE WRIT

The *Brecht* decision clearly set forth the harmless error standard to be applied by federal courts on habeas corpus review, and *Brecht* is not in need of further clarification in the context of the present case.

In *Brecht*, this Court held that the "beyond a reasonable doubt" standard of review for harmless error set forth in *Chapman v. California*, does not apply to the review of a *Doyle* violation in a habeas corpus proceeding. The Court held that the appropriate standard on collateral review is whether the *Doyle* error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638, quoting *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946).

The Court in *Brecht* reasoned that the different standard of review in habeas corpus proceedings promotes the interest of states in finality and sovereignty in criminal matters, and furthers the historic purpose of habeas corpus as a means of relief only to those "grievously wronged." *Id.* at 637.

The petitioner argues that in cases such as the one at issue, where state courts did not conduct a *Chapman* harmless error review, the reviewing federal court should apply the *Chapman* harmless error test, rather than the *Brecht* analysis.

The petitioner relies on decisions in the Second and Eighth Circuits to support his position. (App. pp. 18, 19), *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), *cert. denied*, 511 U.S. 1063, 114 S. Ct. 1634 (1994); *Starr v. Lockhart*, 23 F.3d 1280 (8th Cir. 1994), *cert. denied*, 513 U.S. 995, 115 S. Ct. 499 (1994); *Williams v. Clark*, 40 F.3d 1529 (8th Cir. 1994), *cert. denied*, 514 U.S. 1033, 115 S. Ct. 1397 (1995); *Lyons v. Johnson*, 912 F. Supp. 679 (S.D.N.Y. 1996), *aff'd*, 99 F.3d 499 (2nd Cir. 1996).

A far greater number of Circuit Courts, however, support the position that the *Brecht* harmless error standard should apply on habeas corpus review, regardless of whether a *Chapman* analysis was conducted by the state court. The Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuit Courts of Appeal have applied *Brecht* on this basis. App. 19, *Smith v. Horn*, 120 F.3d 400 (3rd Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1037 (1998); *Robinson v. Arvonio*, 27 F.3d 877 (3rd Cir. 1994), *vacated and remanded*, 513 U.S. 1186, 115 S. Ct. 1247 (1995); *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994), *cert. denied*, 513 U.S. 841, 115 S. Ct. 129 (1994); *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1297 (1998); *Tyson v. Trigg*, 50 F.3d 436 (7th Cir. 1995), *cert. denied*, 516 U.S. 1041, 116 S. Ct. 697 (1996); *Castro v. State of Oklahoma*, 71 F.3d 1502 (10th Cir. 1995); *Horsley v. Arizona*,

45 F.3d 1486 (11th Cir. 1995), *cert. denied*, 516 U.S. 960, 116 S. Ct. 410 (1995).

In *Tyson v. Trigg*, the constitutional error involved the petitioner's Sixth Amendment right to call witnesses in his own defense. The Court of Appeals found the error to be harmless, specifically rejecting Tyson's argument that the *Chapman* test should apply, in that the state court had not found constitutional error. The Court declared Tyson's reasoning to be "wrong", stating that "ordinarily . . . the state court will not have found any error. . . ." *Tyson*, 50 F.3d at 446.

In *Horsley v. Alabama*, the Eleventh Circuit, in a death verdict case, found that the trial court committed error by failing to consider nonstatutory, general evidence of mitigation at the penalty stage. The Alabama state courts had not found error. *Horsley*, 45 F.3d at 1490. Nevertheless, the Circuit Court of Appeals applied the *Brecht* standard, and found the error to be harmless. The court stated by way of footnote:

> We think the Supreme Court's rationale (advancing comity, federalism, finality and the importance of trial) for the *Brecht* rule reaches almost all federal habeas cases, including this one.

Horsley, 45 F.3d at 1492 n.11.

It is clear that the practice of consistently apply the *Brecht* harmless error on collateral review, regardless of whether a *Chapman* review was conducted, is the reasonable and proper course to follow.

In many instances, federal courts on collateral review of state convictions may find constitutional trial errors where state courts have not found error, or even occasionally where the

issue was not raised in the state courts. In other cases, the reviewing court may find that a state court's harmless error analysis was flawed, and resulted in an incorrect holding. Rather than altering review standards based upon the history of the case in the state courts, it is far better to apply the *Brecht* harmless error standard uniformly. It is fair to both petitioners and the government, and promotes the goals of comity and consistency.

As the United States Court of Appeals for the Third Circuit stated in the present case:

> Thus, not to apply *Brecht*, and to apply instead a less deferential standard, is to nullify not merely the policies that the Court has advanced, but the very import of the *Brecht* decision.

App. 24.

By the decision in *Brecht*, this Court recognized the interest of states in finality of judgments, practicable trial process and sovereignty, and it supported the concept of comity. It was proper and reasonable to apply the *Brecht* harmless error standard to petitioner's case.

The fact that certain appellate circuit courts have chosen not to apply the *Chapman* harmless error test in instances where error was first found on collateral review does not warrant further review of this case, where the evidence of guilt has consistently been held to be convincing and overwhelming on federal review.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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